

215. Cranberg read King's Garden as expanding the Anderson exemption to include employees whose work is connected to the espousal of religious views on the air. She added that the Court held that "where a job position has no substantial connection with the program content, or where the connection is with a program having no religious dimension" discrimination will not be permitted. She gave, as examples, writers and research assistants hired for the preparation of programs espousing the licensee's religious views. She added that announcers need not be of a particular faith in order to introduce a program or insert news, commercial announcements, or station identifications[.] She concluded by noting that she had confirmed with the Bureau staff that this reading of the law would still apply.

216. Official notice may be taken that Cranberg's reading of the law was reasonably accurate.

217. The FCC EEO Branch's fourth Bilingual letter was sent on November 17, 1992. MMB Ex. 13. The letter began by stating its purpose: "to advise you of serious questions arising from the Commission's inquiry into the employment activities of Stations KFUE-AM/FM." Id., p. 1. KFUE's December 28, 1992 response acknowledged that these were "grave charges," MMB Ex. 14, p. 27, and that it was "astonished" to receive them. Id., p. 36 n. 12. Nonetheless, there is no evidence that KFUE thought to get a second opinion.

I. Misrepresentations In Renewal Applications And Pleadings

1. The 1982 and 1989 Renewal Applications

218. When the HDO was prepared, the Commission could not have known how detached from reality the renewal applications really were. However, with the benefit of this record, it is now possible to evaluate whether statements made in the renewal applications were true. As shown below, the 1982 and 1989 applications, including a December 29, 1989 supplement to the 1989 applications, contained at least 22 material misrepresentations.

219. The 1982 renewal applications are discussed here because they are continuing representations to the FCC relating to prospective operations. Thus, failure to adhere to those representations without amending them is an inherent misrepresentation.^{39/}

220. The 1982 renewal applications were filed on September 9, 1982. They were signed by Bohlmann. MMB Ex. 1, pp. 1-2. They listed Maurice Anderson, General Manager, as responsible for EEO implementation. Id., p. 5.

221. The 1989 renewal applications were prepared by Stortz. KFUE Ex. 4, p. 17. Bohlmann signed them, doing so because "we have always been proud of the programming and commitment to nondiscrimination." KFUE Ex. 1, p. 2. He could articulate no other basis for signing these documents. Tr. 278.

^{39/} The 1982 and 1989 applications contained virtually identical representations concerning the Stations' EEO policies, as discussed infra. References below to the 1982 applications are to MMB Ex. 1; references to the 1989 applications as supplemented are to KFUE Ex. 4, Tab 16.

222. Stortz claimed that he sent the 1989 applications to Cranberg, who did not suggest material changes. KFUE Ex. 4, p. 19. However, Stortz did not state that Cranberg knew of the full extent of KFUE's EEO deficiencies in practice. Id.; see Tr. 810-11 (Testimony of Paul Devantier). Nor did Cranberg say she knew this. KFUE Ex. 8. Reed Miller was also not informed about KFUE's EEO deficiencies. He was not involved in the development of KFUE's job descriptions, did not know that no African Americans were employed at KFUE except in lower level positions for most of the license term, and never discussed with anyone at KFUE how to document EEO compliance. Joint Ex. 2, pp. 19-23, 24-25, 32.

223. Misrepresentation #1. The 1989 applications identified Devantier as the person "responsible for the administration and implementation of our equal Employment Opportunity Program." KFUE Ex. 4, Tab 16, p. 6. As noted above, KFUE's February 23, 1990 Opposition maintained that management turnover prevented compliance. KFUE Ex. 4, Tab 7, p. 17; see ¶¶168-202 supra. Yet Devantier was Executive Director of the Board for Communications Services for the stations since 1982. KFUE Ex. 7, p. 1. Thus, either February 23, 1990 Opposition falsely attributed EEO noncompliance to management turnover, or the application falsely identified Devantier as the person in charge. Both statements cannot simultaneously be true.

224. Misrepresentations #2 and #3. The 1982 and 1989 applications each state that "[i]t is the policy of KFUD and KFUD-FM to provide equal employment opportunity to all qualified individuals without regard to their race, color, religion, national origin or sex in all personnel actions including recruitment, evaluation, selection, promotion, compensation, training and termination." MMB Ex. 2, p. 5, KFUD Ex. 4, Tab 16, p. 6. As shown at Table 4 supra, pp. 29-36, that was not true: at least 15 positions required no religious duties but carried religious qualifications. These were: (1) FM General Manager (until 6/89); (2) Business Manager; (3) Manager, FM Business Affairs; (4) AM Director of Administration; (5) Audio Resource Services Assistant; (6) AM Secretary; (7) FM Secretary; (8) Secretary to FM Program Director; (9) Secretary to Executive Director of Communications; (10) Secretary to Executive Staff; (11) Receptionist (Business Manager); (12) FM Program Director (until 6/89); (13) FM Announcer/Programmer; (14) FM Librarian, Announcer/Programmer; and (15) Chief Engineer. One position (Chief Engineer) carried no classical duties but carried a classical qualification beginning in June, 1987. The applications never disclosed these facts. Furthermore, KFUD's assumption that African Americans don't listen to its station and are therefore unqualified for certain positions is per se indicative of a policy of discrimination. See February 23, 1990 Opposition, KFUD Ex. 4, Tab 7, pp. 15-16. And the applications did not disclose the Concordia arrangement. See ¶¶51-65 supra.

225. Misrepresentations #4 and #5. The 1982 and 1989 applications each state that "[i]t is also our policy to promote the realization of equal employment opportunity through a positive, continuing program of specific practices designed to ensure the full realization of equal employment opportunity without regard to race, color, religion, national origin and sex." MMB Ex. 1, p. 5; KFUE Ex. 4, Tab 16, p. 6. As shown at ¶¶107-155 supra, that was not true. KFUE never had any such "positive, continuing program" but instead relied on post-hoc rationalizations unsupported by a shred of evidence (e.g. financial inability, see ¶¶159-167 supra; advice of counsel, see ¶¶203-217 supra) to avoid accountability.

226. Misrepresentations #6 and #7. The 1982 and 1989 applications each state that "[i]t is...the responsibility of all persons making employment decisions with respect to recruitment, evaluation, selection, promotion, compensation, training and termination of employees to ensure that our policy and program is adhered to and that no person is discriminated against in employment because of race, color, religion, national origin or sex." MMB Ex. 1, p. 5; KFUE Ex. 4, Tab 16, p. 6. As shown at ¶¶168-202 supra, that was not true. KFUE openly attempted to excuse its nonperformance by arguing that management turnover was responsible. If managers KFUE employed and compensated did not assume their EEO responsibilities, it follows that these statements in the 1982 and 1989 programs were fictitious.

227. Misrepresentations #10 and #11. The 1982 and 1989 applications state that "[t]he station's employment application form contains a notice informing prospective employees that discrimination because of race, color, religion, national origin or sex is prohibited and that they may notify the appropriate local, state, or federal agency if they believe they have been the victims of discrimination." MMB Ex. 1, p. 5; KFUD Ex. 4, Tab 16, p. 6. As shown at ¶¶152-153 supra, KFUD used an employment application form which omitted this information, although the previous form contained the information. Someone at KFUD went to the trouble to delete the information, and to add a requirement for the applicant's "Religious Affiliation." MMB Ex. 25. Someone also went to the trouble to add openly discriminatory language saying that the Synod "retains the right to give preference in the hiring of persons who are members in good standing of an LCMS congregation," language which, it should be remembered, appeared on a universal form used both for the religious AM and the secular FM station. Id. KFUD also kept a dossier on each applicant which provided only three choices: pastor, teacher and layworker. NAACP Ex. 32; see ¶154 supra.

228. Misrepresentations #12 and #13. The 1982 and 1989 applications state that "[w]hen vacancies occur, it is the policy of KFUD and KFUD-FM to seek out qualified minority and female applicants." MMB Ex. 1, p. 6; KFUD Ex. 4, Tab 16, p. 7. Stortz' direct case testimony maintained that he "believed that this statement was accurate because at that time the Stations generally sought qualified minorities and females for openings on their staff." KFUD Ex. 4, p. 17. On crossexamination, he admitted that this was actually only done "toward the end of the license period." Tr. 775. As shown at ¶¶134-140 supra, it was actually only done for two lower level jobs filled in the last two days of the license term.

229. Misrepresentations #14 and #15. The 1982 and 1989 applications state that "[w]e deal only with employment services, including state employment agencies, which refer job candidates without regard to their race, color, religion, national origin or sex." MMB Ex. 1, p. 6; KFUD Ex. 4, Tab 16, p. 7. As shown at KFUD Ex. 4, Tab 6, KFUD did not deal with secular "employment services." There is no evidence that it ever told a state employment agency that it had a job vacancy. Id.; see ¶¶113-133 supra.

230. Misrepresentation #16. Following the language quoted in ¶229 supra, the 1989 applications added further language not included in the 1982 applications. The new language reads: "[w]e contact the various employment services and actively seek female and minority referrals and we specifically request them to provide us with qualified female and minority referrals. See sample reply form attached." KFUE Ex. 7, Tab 16, p. 7. However, as shown at ¶¶126-130 supra, this was not a "sample" at all. It was only used once, and then only because Lauher was concerned that it was license renewal time and was "making sure" the station's tracks were covered. Tr. 189. After Lauher's July 18, 1989 "sample" letter was sent, eight jobs were filled without these or any other EEO contacts. The recipients of the "sample" were never told about these jobs, even though the "sample" letter promised them they would be. Table 6, supra, p. 86; see MMB Ex. 2, p. 8.

231. Misrepresentations #17 and #18. The 1982 and 1989 applications state that "[w]hen utilizing media for recruitment purposes, help-wanted advertisements always include a notice that we are an Equal Opportunity Employer and contain no indication, either explicit or implied, of a preference for one sex over another." MMB Ex. 1, p. 6; KFUE Ex. 4, Tab 16, p. 7. As shown at ¶¶118-120 supra, KFUE placed three ads in Broadcasting magazine which did not contain any such notice. Stortz' direct case testimony simply said that this was an "inadvertent error" but it was not until he was crossexamined that it came out that he had placed at least one of the ads himself. KFUE Ex. 4, p. 12 n. 3; Tr. 777; see ¶120 supra.

232. Misrepresentation #19. KFUO's December 29, 1989 "EEO Supplement", MMB Ex. 2, stated that "during the license period the licensee sent letters to a number of employment organizations in the St. Louis area....Each letter...advised that the licensee would be in direct contact when job openings arise, but requested that any qualified minority group members and/or women be referred to the stations at any time....Despite this effort, none of the letters resulted in any referrals of minority applicants." Id., pp. 2-3. The EEO Supplement was filed over five months after the July 18, 1989 form letter, which is found at MMB Ex. 2, p. 8. During that period, KFUO hired eight people. See ¶230 supra. KFUO knew that it was not "in direct contact" when any of these job openings arose. Thus, it was a serious misrepresentation to suggest that notwithstanding KFUO's "effort" "none of the letters resulted in any referrals of minority applicants."

233. Misrepresentation #20. The December 29, 1989 EEO Supplement manifested that KFUO had established "a successful relationship with the Lutheran Employment Project of St. Louis, a clearinghouse run by the Lutheran Church for employment of members of minority groups. The Project recently referred three black female applicants to the stations to fill an open clerical position. This past November the station hired one of the three to fill this position. The licensee is presently relying on the Project to assist it in similarly filling a second job opening at the stations." MMB Ex. 2, p. 3. The EEO Supplement did not disclose, however, that this "relationship" was limited to lower level jobs even as late as 1991. See ¶¶147-149 supra.

234. Misrepresentation #21. KFUE's December 29, 1992 EEO Supplement manifested that "the licensee will continue to contact the institutions it has already contacted in an effort to further encourage referral of qualified minority applicants." MMB Ex. 2, p. 4. This reference was to educational institutions which received Lauher's July 18, 1989 form letter, MMB Ex. 2, p. 8. As discussed at ¶230 supra, KFUE did not "continue" to make these contacts.

235. Misrepresentation #21. The December 29, 1989 EEO Supplement stated that KFUE "has initiated a new policy of advertising all job openings in the St. Louis Argus, the local newspaper with the highest black readership in St. Louis." MMB Ex. 2, p. 5. This is misleading. The Argus was only used for two lower level jobs during the last week of the license term. See ¶139.

236. Misrepresentation #22. The December 29, 1989 EEO Supplement stated that KFUE had instituted a "data form" which "provides information concerning the sex and race of the applicant, and disposition of the application." MMB Ex. 2, p. 6; the form itself is at MMB Ex. 2, pp. 11-14. The form, which was part of the EEO Supplement and thus was a representation to the Commission, carries the notation at its foot, "Effective July, 1989." Yet Stortz knew the forms were never used. Tr. 618.

**2. The Opposition To Petition To Deny And
 Subsequent Predesignation Submissions**

a. Routine Data Which KFUD Knew Was False

237. KFUD's predesignation pleadings, commencing with its February 23, 1990 Opposition, contained at least the sixteen material misrepresentations discussed below. The numbering in the immediate preceding section is continued for ease of reference.

238. KFUD's February 23, 1990 Opposition contained a list of the positions for which religious training or classical music expertise was supposedly required. KFUD Ex. 4, Tab 7, pp. 13-14 and n. 3. This information is also arranged in tabular form; id., pp. 24-25. Shown in Table 7 below are the only positions the February 23, 1990 Opposition identified as requiring religious or classical music expertise.

TABLE 7

**POSITIONS WHICH KFUP'S OPPOSITION IDENTIFIED AS REQUIRING
OR NOT REQUIRING RELIGIOUS OR CLASSICAL MUSIC BACKGROUNDS**

<u>Position</u>	<u>FCC Form 395-B Classifi- cation</u>	<u>Year Position Existed or Added</u>	<u>Competency the Opposition Claimed Was Required</u>
AM General Manager	Ofcl./Manager	1986	Theological
AM Dir. of Religious Programming	Ofcl./Manager	1986	Theological
FM Program Director	Ofcl./Manager	1986	Classical
FM Traffic Director	Ofcl./Manager	1986	Classical
Chief Engineer	Ofcl./Manager	1986	None
Business Director	Ofcl./Manager	1986	None
AM Dir. of Develop.	Professional	1986	Theological
AM Announcer/ Program Director	Professional	1986	Theological
FM Announcers	Professional	1986	Classical
Bookkeeper	Professional	1986	None
Technician	Technician	1986	None
AM Announcer	Professional	1987	Theological
Sales Workers	Sale Worker	1987	Classical
Director of Broadcast Ministries	Professional	1988	Theological
FM General Manager	Professional	1988	Classical
Salesperson	Sales Worker	1988	Classical
FM Announcer	Professional	1989	Classical
Salespersons	Sales Worker	1989	Classical

239. However, as shown in Table 4 supra, this table contains or reflects at least twenty-three misrepresentations and material omissions.^{40/}

- Misrepresentation #23. The FM Program Director position is represented in the February 23, 1990 Opposition as requiring a classical but not a religious background. The February 23, 1990 Opposition did not report that KFUE had a religious background requirement for this position since at least October, 1986. Until June, 1989, the actual duties of the position did not include religious elements. Table 4, supra, p. 34.
- Misrepresentation #24. The Chief Engineer position position is represented in the February 23, 1990 Opposition as requiring neither a religious nor a classical background. The February 23, 1990 Opposition did not report that KFUE had a religious background requirement for this position since at least October, 1986, and a classical background requirement for this position since at least June, 1987. The actual duties of the position do not include religious or classical elements. Table 4, supra, p. 36.
- Misrepresentation #25. The Business Director [Business Manager] position is represented in the February 23, 1990 Opposition as requiring neither a religious nor a classical background. The February 23, 1990 Opposition did not report that KFUE had a religious background requirement for this position since at least April, 1986. The actual duties of the position do not include religious or classical elements. Table 4, supra, p. 29.

^{40/} An additional misrepresentation relates to sales worker positions. They are said in the February 23, 1990 Opposition to require a classical background. That misrepresentation is so massive that the NAACP has awarded it its own section of this brief. See ¶¶250-278 infra.

- Misrepresentation #26. The FM announcer positions are represented in the February 23, 1990 Opposition as requiring a classical but not a religious background. The February 23, 1990 Opposition did not report that KFUD had a religious background requirement for this position since at least April, 1987. Table 4, supra, p. 35.
- Misrepresentation #27. The FM General Manager position is represented in the February 23, 1990 Opposition as requiring a classical but not a religious background. The February 23, 1990 Opposition did not report that KFUD had a religious background requirement for this position since at least April, 1987. The actual duties of the position did not include religious elements until June, 1989. Table 4, supra, p. 29.
- Misrepresentations #28-34. The table does not report that at least seven lower five category positions carried a theological requirement. Not one of these positions' job descriptions contained any mention of religious-related duties. See ¶93 supra.
- Misrepresentations #35-45. The table does not report that eleven top-four category positions manifested as carrying a theological requirement, KFUD's job descriptions said nothing of theological job responsibilities. See ¶94 supra.

240. Misrepresentation #46. The February 23, 1990 Opposition also stated that "KFUD has drawn on multiple referral sources throughout its license term." KFUD Ex. 4, Tab 7, p. 16. KFUD knew that this was not true. KFUD Ex. 4, Tab 6.

241. Misrepresentation #47. The February 23, 1990 Opposition stated that KFUD "advertised a number of its positions through the years with Broadcasting Magazine. KFUD was able to fill 1987 job openings in both the Sales, and Officials and Managers categories, with applicants who responded to KFUD's advertisements in Broadcasting." KFUD Ex. 4, Tab 7, p. 18. This statement was both misleading and untrue. Of KFUD's 84 job openings during the license term, the "number of its positions" advertised through Broadcasting was at most four. KFUD Ex. 4, Tab 6. No 1987 sales position is noted in KFUD's own records as being hired as a result of a Broadcasting advertisements. Id. And KFUD failed to note that three of its advertisements in Broadcasting did not even state that KFUD is an equal opportunity employer. KFUD Ex. 4, Tab 9, pp. 1, 3, and 8; Tr. 774-80. See discussion at ¶¶118-120 supra.

242. Misrepresentation #48. The February 23, 1990 Opposition stated that "KFUD has advertised job openings during the license period with the St. Louis Post-Dispatch, a major daily newspaper. One of the stations' bookkeepers was hired in 1985 through a Post-Dispatch advertisement." KFUD Ex. 4, Tab 7, p. 18. This statement was misleading and partly untrue. Of KFUD's 84 job openings during the license term, only three were advertised in the St. Louis Post-Dispatch, and two of these were for positions filled on the last two days of the license term. All three of the positions were for secretarial or service worker jobs. KFUD Ex. 4, Tab 6. The bookkeeper hired in 1985 was referred by an internal Synod source, not through the Post-Dispatch. Id., p. 2.

243. Misrepresentation #49. The February 23, 1990 Opposition also stated that "the stations contacted the St. Louis Broadcast Center, the only full-time broadcasting school in St. Louis, to fill job openings during the license period. An announcer at the AM station was hired in 1987 through the Broadcast Center, as was a KFUD-FM Sales employee in 1989." KFUD Ex. 4, Tab 7, p. 19. Again, this is misleading. The Center was not contacted during the first four years of the license term; then it was contacted only four times. KFUD Ex. 4, Tab 6.

244. Misrepresentation #50. The February 23, 1990 Opposition states that "KFUD has established a successful relationship with the Lutheran Employment Project of St. Louis" and has hired one of its referrals for a clerical position, and is "presently interviewing a number of additional minority applicants referred by the Project and will shortly make a hiring decision to fill a second job opening at the stations." KFUD Ex. 4, Tab 7, pp. 19-20. This is misleading because the Lutheran Employment Project was only used for lower level vacancies, even after the renewal term ended while KFUD was under FCC EEO Branch scrutiny. See ¶¶233 supra.

245. Misrepresentation #51. The February 23, 1990 Opposition states that "KFUD has sent letters to a number of employment agencies...specifically requesting them to send qualified minority and female applicants....KFUD has sent similar letters to all of the major educational institutions in the St. Louis area, as well as to The Broadcast Center." KFUD Ex. 4, Tab 7, p. 20. That statement is misleading. As discussed at ¶230 supra, this was a one-time only form letter which did not mention any particular job. KFUD subsequently hired eight people without notifying the recipients of these forms letters, as promised in the form letters.

246. Misrepresentation #52. The February 23, 1990 Opposition state that "KFUO has begun advertising its job openings with the St. Louis Argus, the local newspaper with the highest black readership in St. Louis. KFUO has since also begun advertising with The St. Louis American and The Sentinel, two additional local newspapers with a primarily black readership. KFUO recently interviewed eight persons who responded to advertisements in these publications, and has hired a black male to fill a new position in the Service Workers catetory." KFUO Ex. 4, Tab 7, p. 20. This statement was misleading. As discussed at ¶¶139-140 supra, KFUO never used these newspapers except for two lower level positions, and stopped using them when the license term ended. The Sentinel stopped receiving job notices after the license term ended. NAACP Ex. 10.

247. Misrepresentation #53. KFUO's February 23, 1990 Opposition claimed that "Rev. Otis Woodard, a black Lutheran minister who operates an outreach ministry in northern St. Louis...has referred minority applicants to KFUO." KFUO Ex. 4, Tab 7, p. 20; see also KFUO's September 12, 1992 Motion to Strike, MMB Ex. 11, p. 13. Otis Woodard denies this and his former wife Kathy Woodard concurs. NAACP Exs. 11 and 15; see discussion at ¶¶150 supra.

248. Misrepresentation #54. KFUO's September 12, 1992 Motion to Strike stated that only five of 35 fulltime positions, during the period from October, 1986 through January 31, 1990, were recruited or hired through Concordia Seminary. MMB Ex. 11, p. 20. This was misleading because KFUO did not disclose that during this period, 15 of 34 parttime hires came from Concordia Seminary. See ¶57 supra.

b. The Concordia "Rent Free" Theory

249. Misrepresentations #55-57. Three KFUD pleadings referred to the Concordia arrangement as an exchange of training for rent. February 23, 1990 Opposition, KFUD Ex. 4, Tab 7, p. 17; May 12, 1992 Letter, MMB Ex. 6, p. 3; September 21, 1992 Motion to Strike, MMB Ex. 11, p. 20.^{41/} See ¶¶58-60 supra for thorough quotations from these letters. However, KFUD's employees are themselves employees of the International Center, which is the Synod's main headquarters. MMB Ex. 14, p. 24, n. 6; see also MMB Ex. 11, p. 12. Thus, the "rent free" theory was ridiculous because the Synod could hardly owe itself rent. In Stortz' direct testimony, KFUD propounded a different and equally unfounded theory: that the Concordia arrangement was really intended as a source of people willing to work for low pay. KFUD Ex. 8, p. 4. Yet Stortz and Devantier had no idea how much other stations in the market paid. Tr. 487-88 (Testimony of Dennis Stortz); Tr. 808-09 (Testimony of Paul Devantier). See ¶¶61-65 supra.

^{41/} Since it is contained in three different pleadings, this is treated as three misrepresentations.

c. The Classical BFOO That Wasn't

250. Misrepresentations #58-60. In its February 23, 1990 Opposition to the Petition to Deny, a "classical music" job requirement was first posited as an excuse for not having hired African Americans, in reliance on the supposedly low representation of African Americans among KFUD-FM's listeners. KFUD Ex. 4, Tab 7, pp. 15-16.^{42/} Consequently, the EEO Branch staff asked for an explanation of "those aspects of the duties and responsibilities of the salespersons (14 positions) which require knowledge of classical music."...[a]lso, indicate the classical music background of persons hired for the above noted 14 FM sales positions." EEO Branch Letter to KFUD, November 12, 1992, MMB Ex. 13, pp. 1-2.

251. In its December 28, 1992 "Response to FCC Inquiry," KFUD provided six pages of argument to justify KFUD-FM's "requirement" that its "salespeople be knowledgeable about classical music." The pleading stated that

KFUD-FM enforces this requirement by making every effort to hire such persons whenever it can; it only employs salespeople who do not possess this expertise on those occasions when it is unable to secure suitable persons with the requisite classical music background.

MMB Ex. 14, p. 14.

^{42/} This statement was repeated in at least two other KFUD pleadings. See May 12, 1992 Letter, MMB Ex. 6, p. 7 et seq., and the lengthy discussion in the KFUD's December 28, 1992 Response, MMB Ex. 14, pp. 12-18. Thus it is treated as three misrepresentations.

252. Responding to the EEO Branch's staff request for the classical music background of its salespeople, the pleading only identified classical music background for two of the 14 salespeople it had employed up to that point, Frank Wood and Glynelle Wells. Id., pp. 19-20. The pleading stated that Stortz "recalls that a large number of them were knowledgeable about classical music." Id., p. 19 (citing Stortz' supportive declaration appended to the pleading).^{43/}

253. KFUD attempted to buttress this explanation at trial with the testimony of Peter Cleary. Cleary is the President of Concert Music Broadcast Sales ("CMBS"). CMBS is a representative firm devoted to selling national spot advertising for classical format stations. The firm represents all but three of the commercial classical music radio stations in the United States. KFUD Ex. 5, p. 1, ¶¶1-2.

254. CMBS became the rep firm for KFUD-FM on July 1, 1983. From July, 1983 to the fall of 1986, CMBS maintained an office in St. Louis. KFUD Ex. 5, p. 2, ¶4. CMBS converted KFUD-FM from a noncommercial to a commercial classical station. Id., p. 3 ¶6. See Tr. 210 (Testimony of Peter Cleary).

^{43/} The pleading asserted that "KFUD-FM does not have responses for [the other] former employees. Id., p. 19. That was not true. See NAACP Ex. 32 (includes resumes for several of these former employees, all obtained in discovery from KFUD files.) However, in litigation, documents sometimes mysteriously appear. Thus, this discrepancy cannot fairly be said to rise to the level of a deliberate misrepresentation.

255. In 1983, KFUE-FM had no sales staff; thus, according to Cleary, CMBS "agreed to become KFUE-FM's initial sales force, both nationally and locally." Id., p. 4 ¶7. CMBS opened a St. Louis office, hired Tom Jackson to run it, and "was KFUE-FM's sales force" from July, 1983 to the fall of 1986. Id.

256. Cleary's written statement maintained that KFUE-FM lacked "credibility" with advertisers in 1983 and thus had to undertake an "education effort" including revisions to the "selection and flow of classical music...execution of announcer intros, extros and transitions...[t]he FM technical facility had to be upgraded. The entire staff had to be weened [sic] away from its historical noncommercial attitude." Id., p. 4-5 ¶¶7-8.

257. Therefore, Cleary maintained that "KFUE-FM needed people in sales who had knowledge of classical music" because "the St. Louis advertisers had to be told what KFUE-FM's product was." Id., p. 5 ¶8.^{44/} That "product," for sales people, is commercial airtime. Tr. 229-30 (Testimony of Peter Cleary); Tr. 511 (Testimony of Dennis Stortz).

258. Cleary maintained that in 1986, KFUE-FM chose Jan Hutchinson of CMBS's staff to develop its own sales staff because of "her knowledge and ability" with classical music. Id.

259. The problem with this explanation is that all of KFUE's predesignation pleadings saying that Cleary's advice had been taken were pure fiction. Cleary's statements recounting his own advice were presumably true. However, as shown below, KFUE knew that the stations did not follow CMBS' advice in practice.

^{44/} Cleary indicated that he has "changed my attitude somewhat over the years and now try to emphasize selling ability for at least mature classical music stations." Id., p. 6 ¶10.

260. Jan Hutchinson has worked with approximately 25 radio salespeople and is thoroughly familiar with all aspects of radio sales. NAACP Ex. 8, p. 1. Hutchinson provided a declaration identifying six former KFUO-FM salespeople who she understood to have had no classical music experience. NAACP Ex. 7. Hutchinson herself had no classical music knowledge when she was hired by CMBS, but was highly successful anyway. Id., p. 1. To Hutchinson's knowledge and belief, Charlotte Akin, Beverly Brandt, Bern Hentze, Tom Koon and Judy McMurtry and Cari Perez^{45/} had no classical music training. Id.

261. NAACP Ex. 32 contains all job applications, resumes, hiring memoranda and employee data summaries (prepared by KFUO staff upon hiring an individual) produced in discovery for KFUO salespersons. This data, along with Hutchinson's declaration and Stortz' and Lauher's recollections, is summarized in Table 8.

^{45/} Stortz recalled that Perez worked for a classical station in Miami. Tr. 650. The record is silent on whether Perez had classical music experience, as opposed to experience in sales at another classical station. It is unknown whether the station for which Perez worked required salespeople to have prior classical music experience or whether it expected them to obtain it on the job, or whether it did not consider classical music expertise to be essential to the performance of the job.

TABLE 8

**KFUO SALESPERSONS' CLASSICAL
MUSIC BACKGROUND UPON BEING HIRED**

<u>Salesperson</u>	<u>Extent of Classical Background</u>
Charlotte Akin	Akin's resume showed she had been the program director at a noncommercial classical station for nine months. NAACP Ex. 32, p. 4.
James Bebo	Lauher did not recall Bebo having had any classical background. Tr. 201.
Beverly Brandt	Hutchinson stated that Brandt had no classical background. NAACP Ex. 7, p. 1. Stortz was unable to testify that Brandt had any classical experience. Tr. 646.
Irwin Bressler	Stortz thought Bressler had classical experience. Tr. 646.
Sharisse Bush	Bush' application and resume reflected no classical background. NAACP Ex. 32, pp. 9-11. Stortz only knew that Bush was a KFYO listener. Tr. 647.
Bern Hentze	Hutchinson stated that Hentze had no classical background. NAACP Ex. 7, p. 1. Stortz could only say that Hentze was a supporter of the St. Louis Symphony. Tr. 647-48.
Jan Hutchinson	Hutchinson had no classical background when she started with CMBS. NAACP Ex. 7, p. 1.
Tom Jackson	Jackson was hired by CMBS. Stortz testified that Jackson had had a classical background. Tr. 509-10.
Tom Koon	Hutchinson stated that Koon had no classical background. NAACP Ex. 7, p. 1. Lauher did not recall Koon having had such a background. Tr. 200. Nor did Stortz. Tr. 649. Koon's resume and application reflect no such background. NAACP Ex. 32, pp. 14-16.
Judith McMurtry	Hutchinson stated that McMurtry had no classical background. NAACP Ex. 7, p. 1. Stortz was unable to testify that McMurtry had such background. Tr. 649.
Carolyn Miller	Stortz was unable to testify that Carolyn Miller had any classical background. Tr. 649.

TABLE 8 (continued)

<u>Salesperson</u>	<u>Extent of Classical Background</u>
Cari Perez	Perez' materials from station files are incomplete, as they do not include a copy of her resume. NAACP Ex. 32, pp. 19-21. Stortz thought that Perez had worked for another classical station, but did not know whether she had any classical background. Tr. 650. <u>See</u> n. 45 <u>supra</u> .
Robert Thompson	Stortz could not say that Thompson had had any classical background. Tr. 650.
Glynelle Wells	Wells' resume says that she "attends symphony concerts." NAACP Ex. 32, pp. 23-25 (also MMB Ex. 14, p. 70). Stortz relied on Wells' resume to state that he thought that Wells had some classical background. Tr. 650.
Frank Wood	Stortz testified that he did not know whether Wood had a classical background. Tr. 651. Wood has provided a declaration saying that he worked for three years as an announcer and music director at a "partial classical" station in Waco, Texas and considered himself "fairly knowledgeable" about classical music. MMB Ex. 14, pp. 71-72.

262. Thus, it is fair to conclude that seven salespeople had or might have had at least a weak classical music background, giving KFUD the benefit of every doubt: Akin, Bressler, Hentze, Jackson, Perez, Wells and Wood. Seven salespeople almost surely had no classical music background, inasmuch as if they had such a background someone at KFUD would have known about it: Bebo, Brandt, Bush, Koon, McMurtry, Carolyn Miller and Thompson. One salesperson, Hutchinson, had no classical music background when she started with CMBS but -- again giving KFUD the benefit of the doubt -- might theoretically have attained some by osmosis. See Table 8 supra.

263. Indeed, KFUD did not even recruit for salespeople by contacting sources likely to produce candidates with classical expertise. Lauher testified that he was not told to hire people with classical backgrounds. Tr. 136. Even very obvious sources of such persons were apparently overlooked: other than Hutchinson, who was transferred from CMBS, CMBS was not used as a referral source for any of the fifteen sales positions filled after Hutchinson was hired on September 29, 1986. KFUD Ex. 4, Tab 6, pp. 3-8. Other classical radio stations in nearby cities weren't contacted. Classical music clients, such as the St. Louis Symphony, weren't contacted. Indeed, Broadcasting magazine, an all purpose source which probably would have been read by persons with classical sales experience, was only used for one of these fifteen positions (the one filled by Bern Hentze on January 26, 1987). Id.

264. KFUD's internal documents show that classical music background was not a prerequisite to employment in sales. KFUD's June, 1987 Duty Description for Account Representative did not mention classical background or expertise even as a desirable position qualification, although it did mention such factors as "a working knowledge of research materials" as essential and "broadcast experience" and "experience with an advertising agency" as desirable. NAACP Ex. 40, pp. 10-11. Not until June, 1989 -- after Lauher's March, 1989 memoranda had issued and license renewal time was imminent -- did KFUD change this Duty Description to show that "knowledge of and appreciation for classical music" and "experience with a classical music radio station" were "other desirable" position qualifications for account executives. NAACP Ex. 41, pp. 11-12.